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UNITED STATES DISTRICT COURT – SOUTHERN DISTRICT OF
CALIFORNIA

CHAD MCKINNEY, an individual,
Plaintiff,

V.

**Apollo Group, Inc.,
University of Phoenix, a
Corporation, Mechelle
Bonilla, an Enrollment Manager
at University of Phoenix,
Kyan Flynn, Director of
Enrollment at University of
Phoenix, April Alcorn, an
Employees Relations Consultant at
University of Phoenix,
Carlyn Lindsten, Associate
Director of Enrollment at
University of Phoenix**

Defendants

CASE NO. 07-CV-2373 WQH CAB

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO SET ASIDE ENTRY
OF DEFAULT AGAINST KYAN
FLYNN, MECHELLE BONILLA
AND CARLYN LINDSTEN**

[FRCP 55(c)]

**NO ORAL ARGUMENT, UNLESS
REQUESTED BY THE COURT**

Date: April 21, 2008

Time: 11:00 a.m.

Courtroom: 4

Judge: Hon. William Q. Hayes

DATE OF FILING: December 19, 2007

1
I.2
INTRODUCTION

3 Apollo Group, Inc., (erroneously sued as Apollo Group, Inc., University of
 4 Phoenix, a Corporation), (hereafter, "Apollo"), and Kyan Flynn, Mechelle Bonilla
 5 and Carlyn Lindsten (herein after, the "Individual Defendants")¹ seek to set aside
 6 the clerk's entry of default entered against them in this action for good cause shown
 7 pursuant to Federal Rules of Civil Procedure ("FRCP") 55(c). An entry of default
 8 was made against Apollo and motions to set aside the entry of default and to
 9 dismiss have already been filed.² Subsequently, McKinney has submitted proofs of
 10 return of service and an entry of default has been entered by the Court Clerk
 11 regarding the Individual Defendants. McKinney's improper attempts at service and
 12 failure to state a claim argued in Apollo's motions are equally applicable to the
 13 Individual Defendants. The entries of default were sought in bad faith by
 14 McKinney, because neither Apollo nor the Individual Defendants were never given
 15 proper service of the above-captioned action as required by FRCP Rules 4(e) and
 16 (h).

17 McKinney failed to properly serve the Individual Defendants in accordance
 18 with FRCP Rule 4 because he did not properly serve them via personal service,
 19 substitute service, mail service or service by publication. Although some
 20 procedural rules may be relaxed for *pro se* litigants, all plaintiffs must follow the
 21 rules for service of the complaint. *See Graham v. United States*, 79 Fed. Appx.
 22 992, 994, No. 03-15240, 2003 WL 22514528, at *1 (9th Cir. June 2, 2003). This
 23 procedural step is important not only to ensure due process, but also for
 24 jurisdictional reasons, because absent proper service, a court lacks jurisdiction over
 25 the defendant. Moreover, the content of the summons issued by McKinney does

26 ¹ As of the date of filing this motion, no proof of return of service nor an entry of default has been
 27 filed concerning individually named defendant April Alcorn.
 28 ² Apollo filed these motions on March 7, 2008, and they are set to be heard on April 7, 2008, at
 11:00 a.m. In the interest of judicial economy Apollo and the Individual Defendants request that
 these and plaintiff's motions be consolidated.

1 not meet the general requirements of a summons as delineated by Rule 4(a) since
 2 the summons was not directed to any particular individual or entity.

3 Accordingly, the Individual Defendants bring this motion to set aside the
 4 Court Clerk's entry of default and allow them to provide their responsive motion to
 5 this action.

6

7 **II.**

8 **STATEMENT OF FACTS / PROCEDURAL HISTORY**

9 McKinney filed this complaint on December 19, 2007. [McKinney's
 10 complaint for damages ("Complaint"), pg 1.] McKinney, however, did not obtain a
 11 summons issued by the Court until approximately one month later on January 15,
 12 2008. [Declaration of Nathan W. Hicks ("Hicks Decl."), ¶ 2, Ex. A.] According to
 13 McKinney's proofs of return of service, he attempted to serve the Individual
 14 Defendants under California law through substitute service at their place of work.
 15 [Hicks Decl. ¶ 2, Exs. B, C and D.]

16 McKinney's return of service papers regarding Ms. Flynn and Ms. Lindsten
 17 filed with the Court on March 12, 2008, state that a process server attempted to
 18 serve them "by leaving copies with Ellen Bowens (Administration)" on January 31,
 19 2008. [*Id.*, Exs. B and C.] Neither Ms. Flynn or Ms. Lindsten were personally
 20 served with any legal documents by McKinney, and neither were aware of any
 21 attempts of personal service of legal documents in this matter. [Declarations of
 22 Kyan Flynn and Carlyn Lindsten, ¶ 2.] In fact, neither Ms. Flynn nor Ms. Lindsten
 23 were aware that they were defendants in this matter until they received McKinney's
 24 request for an entry of default against them on March 13, 2008.³ [*Id.*] Moreover,
 25 neither Ms. Flynn or Ms. Lindsten work with Ellen Bowens or are even in her
 26 department. [*Id.*, ¶ 3.]

27
 28 ³ This is very likely since none of the subpoenas were directed to any particular entity or
 individual as is required by FRCP Rule 4(a).

McKinney's return of service papers regarding Ms. Bonilla filed with the Court on March 12, 2008, state that a process server attempted to serve her "by leaving copies with Virginia Torres at defendant's place of employment." [Hicks Decl., ¶ 2, Ex. D.] In the same fashion, however, Ms. Bonilla was never personally served with any legal documents by McKinney, and was never made aware of any attempts at personal service of any legal documents upon her either. [Declaration of Mechelle Bonilla, ¶ 2.] Additionally, she, too, did not know that she was a named defendant in this matter until she received McKinney's notice of default in the mail on March 13, 2008.⁴ [*Id.*, ¶ 3.]

Based on McKinney's assertions that the Individual Defendants were given sufficient service of process on January 31, and February 4, 2008, the Court Clerk made an entry of default on March 12, 2008. [Hicks Decl., ¶ 2 Ex. E.] This motion is made following a reasonable and good faith attempt to conference with McKinney on February 29, 2008. [*Id.*, ¶ 3.] However, after counsel explained McKinney's improper service attempts, not only did McKinney still refuse to cooperate, he filed the foregoing additional improper motions for entry of default two weeks later. [*Id.*]

III.

**THE INDIVIDUAL DEFENDANTS WERE NEVER GIVEN
SUFFICIENT SERVICE OF PROCESS.**

FRCP Rule 4(e) provides in pertinent part:

Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, [...] may be effected in any judicial district of the United States:

(1) pursuant to the law of the state in which the district

⁴ Clearly McKinney knew how to reach the Individual Defendants by mail since all three of them received notices of entry of default on March 13, 2008. Accordingly, it is unacceptable that a copy of the summons and complaint were not mailed to them in accordance with federal and state laws governing proper service of process.

1 court is located [...]; or

2 (2) by delivering a copy of the summons and of the
 3 complaint to the individual or by leaving copies thereof at
 4 the individual's dwelling house or usual place of abode
 5 with some person of suitable age and discretion then
 residing therein or by delivering a copy of the summons
 and complaint to an agent authorized by appointment or
 by law to receive service of process.

6 FRCP Rule 4(e); *LSJ Investment Co., Inc. v. O.L.D., Inc.* 167 F. 3d 320, 322-323
 7 (6th Cir. 1999). To that end, California state law allows for service upon an
 8 individual by delivering a copy of the summons and complaint:

9 Via personal delivery or an authorized agent for service of
 10 process;

11 [or]

12 Substitute service coupled with mailing after a good faith
 13 effort at personal service has been attempted;

14 [or]

15 Mail service, coupled with acknowledgement of receipt;

16 [or]

17 Service by publication.

18 Cal. Code Civ. Proc. §§ 415.10, 415.20, 415.30, 415.50.

19 Thus, under both federal and state law, service of summons upon an
 20 individual is only proper if made by personal service to the individual or their
 21 authorized agent to accept service of process or by substitute service at the
 22 individual's "dwelling house or usual place of abode." *See id.*; FRCP Rule 4(e)(2).
 23 California, however, allows substitute service to be effected at the individual's
 24 residence *or* place of employment as long as a good faith attempt at personal
 25 service was made and the substitute service is coupled with a mailing of a copy of
 26 the summons and complaint to the defendant. Cal. Code Civ. Proc. § 415.20.
 27 When a defendant challenges service of process, a plaintiff bears the burden of
 28 showing that service is valid under Rule 4. *Brockmeyer v. May*, 383 F.3d 798, 800
 (9th Cir. 2004); *Belle, supra, citing Hirsh v. Blue Cross, Blue Shield*, 800 F.2d

1 1474, 1477 (9th Cir. 1986). Moreover, if a plaintiff fails to serve a defendant in
 2 accordance with Rule 4, the court lacks jurisdiction over that defendant. *Jackson v.*
 3 *Hayakawa*, 682 F.2d 1344, 1347 (9th Cir. 1982).

4

5 **A. McKinney Did Not Make Any Good Faith Attempts at Personal Service**
 6 **and Did Not Mail A Copy of the Summons and Complaint to Any of the**
 7 **Individual Defendants.**

8 According to McKinney's proofs of return service, he attempted to serve the
 9 Individual Defendants under California law through substitute service at their place
 10 of work. [Hicks Decl., ¶ 2, Exs. B, C and D.] McKinney failed to comply with the
 11 requirements of California law, and therefore FRCP Rule 4(e), because he did not
 12 demonstrate that he made a good faith attempt at personal service nor that he
 13 provided mail copies of the summons and complaint to the Individual Defendants
 14 via pre-paid first class mail. Cal. Code Civ. Proc. § 415.20(b). [Declarations of
 15 Kyan Flynn, Mechelle Bonilla, and Carlyn Linsten In Support of Motion to Dismiss
 16 Plaintiff's Complaint.]

17 If the defendant challenges the method of service, the burden is on plaintiff to
 18 show that reasonable attempts were made to serve defendant personally before
 19 resorting to substitute service and why personal service could not be effected.
 20 *Evartt v. Superior Court*, 89 Cal. App. 3d 795, 801 (1979). Two or three attempts
 21 to personally serve defendant at a "proper place" ordinarily qualifies as "reasonable
 22 diligence" at attempting personal service. *Espindola v. Nunez*, 199 Cal. App. 3d
 23 1389, 1392 (1988); *Stafford v. Mach*, 64 Cal. App. 4th 1174, 1182 (1998).
 24 Furthermore, McKinney did not even bother to mail a copy of the summons and
 25 Complaint to the Individual Defendants as is required under California law. Cal.
 26 Code Civ. Proc. § 415.20(b); *Khourie, Crew & Jaeger v. Sabek, Inc.*, 220 Cal. App.
 27 3d 1009, 1015 (1990).

28 Indeed, McKinney failed to even direct the summons and Complaint to any

1 individual at all as required by FRCP Rule 4(a). Instead, McKinney simply
 2 dropped off an envelope to UOP employees, Ellen Bowens and Virginia Torres,
 3 without regard to their connection with the Individual Defendants,⁵ and expected
 4 this to constitute sufficient service of process. This is unacceptable under
 5 California law and the Federal Rules.

6 While procedural rules may be relaxed for *pro se* litigants, even a *pro se*
 7 plaintiff must comply with the rules for service of process. *See Graham v. United*
 8 *States*, 79 Fed. Appx. 992, 994, No. 03-15240, 2003 WL 22514528, at *1 (9th Cir.
 9 June 2, 2003) *citing Hamilton v. Endell*, 981 F. 2d 1062, 1065 (9th Cir. 1992)
 10 (abrogated on other grounds by *Estate of Ford v. Ramirez-Palmer*, 301 F.3d 1043,
 11 1045 (9th Cir. 2002)).

12 Accordingly, since McKinney did not properly serve any of the Individual
 13 Defendants, the Clerk's entry of defaults should be set aside.

14 IV.

15 THE INDIVIDUAL DEFENDANTS DID NOT REASONABLY BELIEVE 16 THEY HAD BEEN GIVEN SUFFICIENT SERVICE OF PROCESS.

17 Given that: (1) the summons was not properly directed to any entity or
 18 individual; (2) McKinney did not make any reasonable attempts at personal service;
 19 (3) McKinney did not mail a copy of the summons and Complaint to the Individual
 20 Defendants; and (4) neither of the Individual Defendants were made aware of their
 21 involvement in this action until McKinney mailed them a notice of default on
 22 March 13, 2008, there was no reason to believe that the Individual Defendants had
 23 been given sufficient service of process by McKinney in this matter. Accordingly,
 24 if it is found that McKinney's service upon the Individual Defendants was

25 ⁵ It is also McKinney's burden to demonstrate that there was a "close connection" between the
 26 person being served and the person receiving substitute service on their behalf. *See* Judicial
 27 Counsel Comment to Cal. Code Civ. Proc. § 415.20. In fact, Ms. Bowens does not even work in
 28 the same department as Ms. Flynn or Ms. Lindsten, and not even in the same city as Ms. Flynn.
 [Flynn and Lindsten Decl., ¶ 3.]

1 sufficient, they reasonably believed, but were mistaken, that they had not been
2 given actual notice and properly service so that they should be relieved from the
3 Clerk's entry of default.

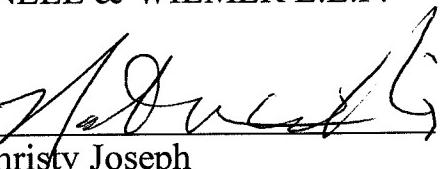
4
5 V.
6

7 **CONCLUSION**
8

9
10 For the reasons stated above, the Individual Defendants respectfully request
11 the Court to set aside the Clerk's entry of default for good cause shown.
12
13

14 Date: March 14, 2008
15

16 SNELL & WILMER L.L.P.
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18 By: 
19 Christy Joseph
20 Nathan W. Hicks
21 Attorneys for Apollo Group, Inc.
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**McKinney v. Apollo Group, Inc., et al.
USDC, Southern – Case No. 07-CV-2373**

PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 600 Anton Boulevard, Suite 1400, Costa Mesa, California 92626-7689.

On March 20, 2008, I served, in the manner indicated below, the foregoing document described as

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
MOTION TO SET ASIDE ENTRY OF DEFAULT AGAINST KYAN FLYNN,
MECHELLE BONILLA AND CARLYN LINDSTEN**

on the interested parties in this action by placing true copies thereof, enclosed in sealed envelopes, at Costa Mesa, addressed as follows:

I am employed in the office of a member of the bar of this court at whose direction the service was made.

Please See Attached Service List

- BY REGULAR MAIL: I caused such envelopes to be deposited in the United States mail at Costa Mesa, California, with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the United States Postal Service each day and that practice was followed in the ordinary course of business for the service herein attested to (C.C.P. § 1013(a)).
 - BY FACSIMILE: (C.C.P. § 1013(e)(f)) and by e-mail
 - BY FEDERAL EXPRESS: I caused such envelopes to be delivered by air courier, with next day service, to the offices of the addressees. (C.C.P. § 1013(c)(d)).
 - BY PERSONAL SERVICE: I caused such envelopes to be delivered by hand to the offices of the addressees. (C.C.P. § 1011(a)(b)).

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 20, 2008, at Costa Mesa, California.

Rudi L. Wilson

McKinney v. Apollo Group, Inc., et al.
USDC, Southern – Case No. 07-CV-2373

<p>Chad McKinney Pro Se 6266 Madeline Street, Apt. #61 San Diego, CA 92115 (619) 634-3566</p>	<p>Plaintiff, Pro Se</p>
<p>United States District Court Attention: Hon. Judge William Q. Hayes Courtroom 4 880 Front Street, Room 4290 San Diego, CA 92101-8900 (619) 557-5600</p>	<p>Courtesy Copy</p>

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